

**LETTER OPINION
2002-L-13**

February 25, 2002

Honorable Wayne G. Sanstead
Superintendent of Public Instruction
600 East Boulevard Avenue
Bismarck, ND 58505-0440

Dear Dr. Sanstead:

Thank you for your letter asking about school district liability for the costs of special education under the two scenarios you present.

Your recitation of the background for your questions does not state that any orders have been issued under N.D.C.C. § 15.1-29-14 (placement for noneducational purposes), so I will assume that section is not relevant to your query. School districts in other states have no obligation to pay tuition to school districts in this state unless through an agreement under N.D.C.C. § 15.1-29-02. Developmentally disabled persons are entitled to a free appropriate public education under N.D.C.C. ch. 15.1-32. N.D.C.C. § 25-01.2-13. Determining residency is a question of fact. Habberstad v. Habberstad, 444 N.W.2d 703 (N.D. 1989). Finding facts for determining residency for school purposes is beyond the scope of Attorney General's opinions. 2000 N.D. Op. Att'y Gen. L-111.

The North Dakota Supreme Court, in the case of Anderson v. Breithbarth, 245 N.W. 483 (N.D. 1932), indicates what should be considered when determining the residence of a student for education purposes:

It is clear the Legislature, in compelling the attendance of children at school, did not have in mind the domicile of the parent, but had in mind the place where the child actually lived and stayed as his home, whether living with parent or with guardian or with one who was furnishing a home but had not adopted him.

. . . The term "residing in the district" means what it says -- a child who makes its home in that particular district, whether with its parents, or with other persons, when that place is the only home it has, a place to which she comes and where she remains when not "called elsewhere for labor or special or temporary purpose."

. . . .

. . . It is clear the term “residing” must be construed with reference to the children, and thus cover all cases where children are actually living in the district, and making it their home, whether in the custody of parents or a guardian or of any charitable and kindly disposed person. It includes a minor, who is an orphan and has no legal guardian, providing his home is in that district.

There is nothing in this construction of the law which permits any child to come into a school district merely for the purpose of obtaining school privileges. . . . The requirements for the payment of tuition governs such a case; and it is immaterial whether the child comes alone or the parents come with it. When the purpose is the purpose of a nonresident to obtain the school privileges, then the law providing for tuition governs.

Id. at 487.

Thus, the school district of residence of the student, which is responsible for the student’s education, is that school district where the student lives and stays as his or her home, unless the student moved to the school district merely for the purpose of obtaining school privileges in that school district. As the Breithbarth case indicates, the residence of the parents or guardian is irrelevant to determining the residence of the student for education purposes.

While this office does not make findings of fact in our opinions, I will address the factual scenarios outlined in your letter. Be advised, however, that the analysis is based solely on the facts as you presented. Your first scenario involves a student with a disability who was placed in a private school outside the student’s school district of residence pursuant to an individualized education program team determination. You indicate that the Developmental Disabilities unit of the Disability Services Division of the North Dakota Department of Human Services (hereafter, “Developmental Disabilities”) was involved with this placement. The parents of the student recently moved out of the state and left their child at the private school. Though you do not mention it, this placement must also have been supported by a contract between the school district of residence and the private school under N.D.C.C. § 15.1-32-15 or its predecessor statute. The contracts required to be entered into between school districts of residence and the public or private schools providing special education services do not change the residence of the student. In Interest of G.H., 218 N.W.2d 441, 448 (N.D. 1974). Also, the involvement of Developmental Disabilities is not relevant to the determination of who is liable for the costs of special education.

The facts of the G.H. case are similar to the background in your first scenario. G.H. was a handicapped child being educated outside her district of residence at the private Crippled Children's School¹ at Jamestown. This arrangement was pursuant to contract between her school district of residence and the Crippled Children's School. While attending the private school, the child's foster care was paid by her county welfare board, and her school district of residence paid tuition pursuant to the contract noted above. However, during the time she was attending the private school, her parents moved to Minnesota and left her at the private school. At that time the school district stopped paying her education costs. After various judicial proceedings, the North Dakota Supreme Court held that liability for tuition was based on the child's residence for school purposes pursuant to the criteria stated in the Breithbarth case. The Court determined that the child's school district of residence for school purposes was the school district the student resided in at the time of placement in the private school. The Court determined the child's school district of residence had not changed even though her parents had moved out of state, because if her school district of residence had had facilities to educate handicapped children, she would still be living in that school district. The school district of residence continued to be responsible for the child's special education costs even though the child was placed in a private school outside the district and the parents had moved out of the state.

It is therefore my opinion that the student's school district of residence, as determined by the criteria stated in the Breithbarth case, is responsible for the costs of special education for the student in your question. Determining the specific facts of the issue you relate must be done by the parties involved to determine the student's residence for school purposes. 2000 N.D. Op. Att'y Gen. L-111. However, based on the North Dakota Supreme Court's conclusion in the G.H. case, it would appear that the North Dakota school district where the student lived at the time of the student's placement in the private school continues to be responsible for the student's educational costs.

Your second scenario involves a student with a disability who is over the age of eighteen and is, therefore, an adult. N.D.C.C. § 14-10-02. The student is still eligible for attendance at public schools. N.D.C.C. § 15.1-06-01. The student is nineteen years old and had been placed for special education purposes in a public school district outside the student's school district of residence. The student lives in a residential facility in the school district in which the student was placed. At the time of the student's placement, the student resided with her mother in the school district of residence. The student's father resides in a different community and school district in North Dakota. The student's mother is the guardian and conservator for this student. The mother recently remarried and relocated to a different state. Because the student is over eighteen years of age, but is under the guardianship of her mother, and because the father does not have custody of this student, you ask which school district bears responsibility for this student's education.

¹ The Crippled Children's School is now called the Anne Carlsen Center for Children.

As with any other person eligible for a free appropriate public education, this student's residence for school purposes is determined by the criteria stated in the Breithbarth case noted above. The fact that the student is over the age of eighteen does not change the analysis. As the Breithbarth case indicates, the residence of a student's parents or guardian does not determine the residence of the student for education purposes. Based on the North Dakota Supreme Court's conclusion in the G.H. case, it appears that the school district of residence, which is responsible for payment of the student's special education costs, is the school district in which the student resided at the time of the student's placement.

In conclusion, school districts should follow the analysis in the Breithbarth case when determining the residence of a student. The school district should ask two questions. The first question is:

Question 1: Did the student come into the school district merely for the purpose of obtaining school privileges in that school district?

If the answer to this question is yes, the student is not a resident of the school district.

If the answer to the first question is no, continue on to the second question. The second question is:

Question 2: In what school district does the student live and stay as his or her home?

The answer to question 2 is the student's school district of residence, which is responsible for the education of the student. As the Breithbarth case indicates, where the student's parents or guardian live is irrelevant.

If the student has been placed for special education purposes outside the student's school district of residence, it appears from the G.H. case that the school district of residence where the student lived at the time of the placement will continue to be responsible for the student's costs of education regardless of where the parents live.

Sincerely,

Wayne Stenehjem
Attorney General